REBUTTAL OF WHITE PAPER CONCERNING COMMISSION AUTHORITY UNDER 39 U.S.C. § 3622(d)(3)

I. Introduction

On October 28, 2014, a group of mailing-industry organizations sent a white paper to the Postal Regulatory Commission (Commission) expounding on their view of 39 U.S.C. § 3622(d)(3).[1] The white paper asserts that this provision allows the Commission only to tinker with relatively minor features of its market-dominant rate regulations, and does not permit the Commission to revise or replace the Consumer Price Index (CPI)-based price cap or certain other aspects of the current regulatory system. In particular, the Mailers assert that the Postal Accountability and Enhancement Act (PAEA) established as permanent a CPI cap, applied at the class level, which can only be exceeded upon a showing of extraordinary or exceptional circumstances.[2]

As detailed below, however, the Mailers' argument falls apart upon examination of the statute's unambiguous text and the clear statement of Congressional intent in the legislative record. As both of those sources make clear, Congress intended for the current "system for regulating rates and classes for market-dominant products" to be sacrosanct only for ten years, at which time the Commission is required to examine whether that "system," including the current CPI price cap, ought to be kept, revised, or replaced with an "alternative system."[3] A Commission decision to replace the current price cap with an alternative system, pursuant to the necessary findings, would not "subvert the judgment of Congress," as the Mailers contend.[4] Rather, it would fulfill the Congress's judgment to entrust the Commission with the responsibility to design a system that best achieves various statutory objectives, after the initial ten-year period in which the CPI price cap must remain in effect. There is nothing implausible or unconstitutional

[1] These organizations are the Alliance of Nonprofit Mailers; the Association for Postal Commerce; the Association of Marketing Service Providers; the Direct Marketing Association; the Envelope Manufacturers Association; MPA-The Association of Magazine Media; the National Association of Advertising Distributors, Inc.; and the Saturation Mailers Coalition. This memorandum will refer to the group collectively as "the Mailers" and to their submission as the "White Paper."

[2] White Paper at 3-4.

[3] 39 U.S.C. § 3622(d)(3).

[4] White Paper at 4.

about this grant of authority to the Commission, since Congress gave the Commission clear standards for its determination.

II. Section 3622's Plain Text Clearly Indicates That the Commission Can Replace the Price Cap System with an "Alternative System"

Through dogged repetition, the Mailers sketch a lopsided caricature of the relevant statutory provision: one that allows the Commission only to "review and modify" the ratemaking system.[5] That false premise is necessary for the Mailers to then invoke *MCI Telecommunications Corp. v. AT&T Co.*[6] in order to claim that "modification" is too modest a concept to encompass replacement of the CPI price cap and other aspects of the regulatory system, such as the exigency standard. This argument ignores the actual language of Section 3622(d)(3), to which the Mailers give conspicuously short shrift. That provision reads as follows:

> Ten years after the date of enactment of the Postal Accountability and Enhancement Act and as appropriate thereafter, the Commission shall review the system for regulating rates and classes for market-dominant products established under this section to determine if the system is achieving the objectives in subsection (b), taking into account the factors in subsection (c). If the Commission determines, after notice and opportunity for public comment, that the system is not achieving the objectives in subsection (b), taking into account the factors in subsection (c), the Commission may, by regulation, make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives.[7]

Congress allowed the Commission's review to result not only in "modification," but also in the adoption of a whole "alternative system for regulating rates and classes for market-dominant products." This language is immediately distinguishable from the statutory provision at issue in the *MCI* case, which allowed the Federal Communications Commission (FCC) only to "modify" certain requirements in the Communications Act.[8] Regardless of the scope of the Commission's authority to "modif[y]" the regulatory system under Section 3622(d)(3), the provision's "alternative system" option expressly confers upon the

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[5] *Id.* at 7; *see also id.* at 2 (describing Section 3622(d)(3) as "direct[ing] the Commission to review and possibly modify" the rate-regulation system, whereas "eliminating the CPI cap would contravene" the statute), 8 ("*MCI* makes clear that substantive provisions 'at the heart' of the statute may not be amended through modifications. . . . A statutory provision calling for the review of a regulatory system cannot reasonably be interpreted as a basis for a complete overhaul of the fundamental principles of the system.").

[6] 512 U.S. 234 (1994).

[7] 39 U.S.C. § 3622(d)(3) (emphasis added).

[8] 512 U.S. at 220.

Commission the broad authority to make fundamental changes to the regulatory system, including through "wholesale abandonment or elimination of a requirement,"[9] in a manner that was not provided for in the FCC statute at issue in *MCI*.

The Mailers' claim that the price cap is a "fixed and binding constraint" beyond the reach of Section 3622(d)(3)[10] likewise does not hold up to a plain reading of the statute. As the Mailers recognize, the words of that provision must be read carefully, in terms of "the specific context in which they are used and within the broader context of the statute as a whole."[11] Overall, Section 3622 makes clear that the CPI price cap is only a mandatory "requirement" for the "system for regulating rates and classes" that the Commission must establish "within 18 months after the date of enactment of this section" and keep in place for ten years.[12] In other words, rather than the CPI price cap being permanently "hard-wired" at the top of the "statutory hierarchy,"[13] and outside of the "system" that the Commission is to review and potentially replace, the CPI price cap unambiguously resides within the larger category of the "system." At the ten-year mark, Section 3622(d)(3) mandates that the Commission review that very "system" – of

[9] *See id.* at 221 (citations and internal quotation marks omitted). Therefore, it is irrelevant whether rescinding or "substantially loosen[ing]" the CPI cap (whatever that may mean), White Paper at 4, is more than a "modification," because the Commission's statutory authority extends far beyond "modifications."

[10] White Paper at 4.

[11] *Id.* at 10 (quoting Order No. 547, Order Denying Request for Exigent Rate Adjustments, PRC Docket No. R2010-4 (Sept. 30, 2010), at 25 (citing *Chemehuevi Tribe of Indians v. Fed. Power Comm'n,* 420 U.S. 395 (1975); *Cody v. Cox,* 509 F.3d 606, 609 (D.C. Cir. 2007))).

[12] 39 U.S.C. § 3622(a), (d)(1), (d)(3). As the Mailers point out in connection with the very same statutory phrase, "[a] word or phrase that appears in two or more provisions of the same Section of a statute is presumed to have the same meaning each time." White Paper at 10 (citing *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980); *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). According to that canon, the "system" referred to in Section 3622(d)(1) is the same "system" in Section 3622(a), and the same "system" that the Commission is to review and potentially replace with an "alternative system" in Section 3622(d)(3). That the Mailers somehow reach the opposite conclusion demonstrates the tortured logic with which they analyze Section 3622.

[13] White Paper at 12. The Mailers gain nothing by repeatedly citing prior Commission statements regarding the centrality of the CPI price cap. The Commission's past pronouncements on the price cap's "out-of-bounds" status, *see id.* at 5-6, 12-15, are obviously to be read in the context of the current rate-regulation system established by Congress as an interim system, for which such pronouncements are no doubt true. At no time was the Commission purporting to account for Section 3622(d)(3), the effect of which remained several years away. It is unreasonable to expect the Commission to have qualified every such pronouncement with a disclaimer about Section 3622(d)(3), or to read anything into the Commission's failure to do so as prejudicing its review in 2016. In any event, such statements do not serve to alter the plain meaning and legislative history of Section 3622(d)(3), which clearly indicate that Congress did not consider the CPI cap to be "out of bounds" following the conclusion of the ten-year interim period.

which the CPI cap is a subordinate feature – and potentially replace it with an "alternative system" that may have different features, depending on what the Commission finds is necessary to achieve the statutory objectives.[14]

Had Congress meant to bar the Commission from revising the CPI price cap or the other features of Section 3622(d)(1)-(2) that the Mailers consider to be sacrosanct, it would have used language excluding those provisions from the Section 3622(d)(3) review, or it would have cast those provisions' subject matter as something other than a feature of the initial "system."[15] Yet Congress did neither of these things. Given that the Commission's review must cover all features of the current "system" that have been "established under" Section 3622 as a whole, a specific reference to the CPI-price-cap feature would be necessary to exclude it from the Commission's purview, not to include it, as the Mailers claim.[16]

Finally, even if the statute were not as unambiguous as it is, the Mailers' proposed construction would impart to Section 3622(d)(3) an implausible, impermissible degree of insignificance. The Mailers state that the PAEA established as permanent a ratemaking system "whereby the Postal Service cannot raise rates by more than CPI, as applied at the class level, absent extraordinary or exceptional circumstances."[17] Taking the reasoning employed in the White Paper to its logical conclusion, all of the provisions of Section 3622(d)(1)-(2) would be immune from the Commission's review under Section 3622(d)(3), considering that they are, just like the provisions specifically mentioned by the Mailers, all phrased as "requirements" that "shall" be part of the initial system. This would essentially leave the Commission with nothing to do except tinker with the finer points of its implementing regulations, which it

[14] For recent perspectives on possible modifications or "alternative systems" that could emerge from the Commission's Section 3622(d)(3) review, see Michael J. Ravnitzky, Postal Price Cap Regulation: United States Experience Since 2006, Paper Presented at the Rutgers University Center for Research in Regulatory Industries Eastern Conference 25-27 (May 15, 2014), http://www.prc.gov/sites/default/files/papers/Postal%20Price%20Cap%20Regulation_3609.pdf; UNITED STATES POSTAL SERVICE OFFICE OF THE INSPECTOR GENERAL, REPORT NO. RARC-WP-13-007, REVISITING THE CPI-ONLY PRICE CAP FORMULA (2013) [hereinafter "OIG REPORT"].

[15] *See* 2A NORMAN & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:1 (7th ed. 2014) ("Courts may, for example, defend a particular interpretation by arguing that if the legislature had intended otherwise, it would have said so."); *cf. Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (invoking this principle to uphold an award of attorneys' fees for good-faith but unsuccessful vaccine injury compensation claims, because "[i]f Congress had intended to limit fee awards to timely petitions, it could easily have done so").

[16] White Paper at 9.

[17] *Id.* at 3-4.

can do under the statute regardless of Section 3622(d)(3).[18] The whole purpose of also including Section 3622(d)(3) in the PAEA is to empower the Commission to examine and potentially replace the "requirements" of Section 3622(d)(1)-(2) that form the core of the initial regulatory system that Congress established. Therefore, the Mailers' interpretation would convert Section 3622(d)(3) into mere surplusage, which the Commission may not do.[19]

III. The Legislative Record Contains a Detailed Explanation of Congress's Intent to Allow the Commission to Revise or Replace the Price Cap

The Mailers' argument is further undermined by unambiguous legislative history regarding the purpose of Section 3622(d)(3). The Mailers brazenly claim that the legislative history "indicates that the CPI cap is mandatory," or at least that "[n]one of the legislative history speaks to the purpose or proper interpretation of the review provision of Section 3622(d)(3)."[20] But the Mailers completely neglect to account for a floor speech by Senator Susan Collins, the primary sponsor of the bill, that does, in fact, explain the "purpose [and] proper interpretation of the review provision of Section 3622(d)(3)."

Senator Collins, who was the Chairman of the Senate Committee on Homeland Security and Governmental Affairs at the time, made this speech when H.R. 6407, the compromise bill reconciling the House and Senate versions of the PAEA that Congress ultimately enacted into law, was brought to the Senate floor for passage:

> The compromise legislation before the Senate replaces the current lengthy and litigious rate-setting process with a rate cap-based structure for products such as first class mail, periodicals, and library mail. For 10 years, the price changes for market-dominant products like these will be subject to a 45-day prior review period by the Postal Regulatory Commission. The Postal Service will have much more flexibility, but the rates

[18] 39 U.S.C. §§ 503, 3622(a). The Mailers never explain what, in their view, the Commission would be able to do under Section 3622(d)(3), beyond oblique references to "evaluat[ing] and modify[ing] the regulatory scheme set up in response to [sic] PAEA" and "modify[ing] its regulations or adopt[ing] alternative regulations." White Paper at 8. Beyond the fact that Section 3622(d)(3) refers to modifying or adopting an alternative to the initial statutory ratemaking system, the Commission can "evaluate and modify" its regulations anytime.

[19] *See, e.g.*, *TRW Inc. v. Andrews*, 543 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (citations and internal quotation marks omitted)); *see also Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013) ("[T]he canon against surplusage assists . . . where a competing interpretation gives effect to every clause and word of a statute." (citation and internal quotation marks omitted)).

[20] White Paper at 16.

> will be capped at the CPI. That is an important element of providing 10 years of predictable, affordable rates, which will help every customer of the Postal Service plan.
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> After 10 years, the Postal Regulatory Commission will review the rate cap and, if necessary, and following a notice and comment period, the Commission will be authorized to modify or adopt an alternative system.
>
> While this bill provides for a decade of rate stability, I continue to believe that the preferable approach was the permanent flexible rate cap that was included in the Senate-passed version of this legislation. But, on balance, this bill is simply too important, and that is why we have reached this compromise to allow it to pass. We at least will see a decade of rate stability, and I believe the Postal Rate Commission, at the end of that decade, may well decide that it is best to continue with a CPI rate cap in place. It is also, obviously, possible for Congress to act to reimpose the rate cap after it expires. But this legislation is simply too vital to our economy to pass on a decade of stability. The consequences of no legislation would be disastrous for the Postal Service, its employees, and its customers.[21]

As Senator Collins clearly explained, Congress enacted a deliberate compromise in which the CPI price cap imposed by the Senate version would be a mandatory feature of the regulatory system only for "10 years," rather than being "permanent." She expressly noted that, following the end of the interim period, the price cap "expires" as a mandatory requirement of the system, and that the Commission, as part of its mandatory review, is empowered to decide whether it is "best to continue with a CPI rate cap in place" or "adopt an alternative system."

[21] 152 Cong. Rec. S11,675 (daily ed. Dec. 8, 2006) (statement of Sen. Collins). This floor speech from the PAEA's Senate sponsor discussing the language of H.R. 6407, the compromise legislation negotiated between the House and Senate and enacted into law, is clearly more germane than the House committee report that the Mailers quote, White Paper at 16-17, which discussed a very different version of the rate-regulation provisions from a year and a half earlier. Not even that outdated committee report supports the Mailers' thesis, however. The earlier version of the bill would have allowed the Commission's rate-regulation system to include cost-of-service regulation, revenue targets, and other alternatives to a price cap. H.R. REP. NO. 109-66, pt. 1, at 4 (2005). As the Mailers' own quotation from the committee report points out, the CPI price cap in that earlier bill was not truly "out of bounds": it could be pierced in any instance where the Commission deemed an upward departure to be reasonable, equitable, and necessary. *Id.*; *see also* White Paper at 16-17 (quoting H.R. REP. NO. 109-66, pt. 1, at 86 ("[T]he legislation would mandate that the average rate for any market dominant product could not rise more than the annual increase in the Consumer Price Index (CPI), unless a larger increase would be necessary to ensure the viability of the Postal Service." (emphasis added))). Despite the nominal stricture of CPI, the House bill would effectively have established CPI as only a general guiding principle; the ultimate criteria of "reasonable, equitable, and necessary" would have been consistent with the previous ratemaking standard under the Postal Reorganization Act. *See* 39 U.S.C. § 3621 (2005).

Therefore, far from being nonexistent or supportive of the Mailers' position, the legislative history clearly demonstrates that Section 3622(d)(3) empowers the Commission to adopt an alternative rate-regulation system, including one that replaces the CPI price cap.[22]

IV. There is Nothing Illogical or Implausible About the Commission Having the Authority to Replace the CPI Cap

The clarity of the plain language and legislative history belie the Mailers' argument as to the plausibility of Section 3622(d)(3)'s delegation to the Commission of the authority to replace the CPI cap.[23] The Mailers assert that their interpretation is necessary because "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes."[24] As discussed in the previous section, however, Section 3622(d)(3) is no "mousehole," but a central component of a carefully crafted compromise regarding the design of the ratemaking system. It effectuates Congress's balanced judgment to impose a fixed CPI price cap for a decade and, thereafter, to empower the Commission to decide what sort of rate-regulation system would best serve the objectives set forth in the law.

Nor is there anything illogical or implausible about Congress delegating to the Commission the task to comprehensively determine the contours of the regulatory system for market-dominant products. Other regulatory agencies, like the FCC and the Federal Energy Regulatory Commission (FERC), have

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[22] The Mailers' wholesale misrepresentation of the facts is further apparent when they claim, at page 17 of the White Paper, that an Office of the Inspector General (OIG) report "acknowledged[that] eliminating the CPI cap would require an act of Congress." *See also* White Paper at 20 (asserting that the OIG report "recognized" that "[w]holesale repeal or modification of the heart of [sic] PAEA would additionally infringe upon the powers of Congress"). This flatly misstates the very quote on which the Mailers rely for this point, in which the OIG speaks of a contingency where Congress decides through legislation to continue some form of "a price cap." *Id.* at 17 fn.6 (quoting OIG REPORT at iv). As is obvious from the OIG report's cover letter addressed to Senator Tom Coburn, the OIG report is designed to advise Congress about potential legislative reform options in 2013, not the Commission about its options under current law in 2016. Nothing in the OIG report expresses any position that forecloses the possibility of the Commission being the one to adopt an alternative price cap pursuant to current law. Rather, the OIG said exactly the opposite, noting that the Commission "also appears to have the authority to modify the price cap or to adopt an alternative form of regulation if warranted after the 10 year review, 39 U.S.C. § 3622(d)(3)." OIG REPORT at 1 fn.7.

[23] *See* White Paper at 8-9.

[24] *Id.* at 9 (ellipses in original, citation and internal quotation marks omitted).

operated under similarly broad, if not broader, authority.[25] Indeed, the FCC did away with rate-of-return regulation and designed an entire price-cap system from scratch on the sheer basis of its general regulatory authority.[26] The authority that Section 3622(d)(3) assigns to the Commission is therefore commensurate with that commonly exercised by other federal regulatory agencies.

V. Giving Effect to Section 3622(d)(3)'s Plain Meaning Does Not Raise "Constitutional Doubt"

The Mailers' concluding argument, to the effect that interpreting Section 3622(d)(3) to authorize replacement of the CPI cap "would raise constitutional issues,"[27] is utterly baseless. To invoke the canon of constitutional avoidance, the Mailers must show that the statute at issue is "genuinely susceptible to two constructions after, and not before, its complexities are unraveled," and that one of those constructions creates "a serious likelihood that the statute will be held unconstitutional."[28] As the preceding sections have explained, the statute is not ambiguous. Nor is it unconstitutional.

The Mailers fail to demonstrate any "constitutional issues" with interpreting Section 3622(d)(3) in accordance with its plain language and legislative history. The Mailers' *Clinton v. New York* argument relies on the wholly flawed premise that Congress established the CPI price cap as permanent and "indispensable."[29] From there, they then assume that any interference with the continued application of that cap must be an "effective[ ] repeal" of statutory language and therefore invalid under the

[25] 16 U.S.C. §§ 824d(a)-(b), 824e(a) (requiring rates and charges of FERC-regulated utilities to be "just and reasonable" and not unduly discriminatory or preferential, and authorizing FERC to determine and fix such rates); *id.* at § 824s (requiring FERC to establish certain transmission rate incentives, subject to four criteria and the general requirements of sections 824d and 824e); 47 U.S.C. § 201(b) (requiring charges for and classes of FCC-regulated communications services to be "just and reasonable," and allowing the FCC to "prescribe such rules and regulations as may be necessary in the public interest"); *id.* at § 205(a) (authorizing the FCC "to determine and prescribe" "just and reasonable charge[s]" and "just, fair, and reasonable" classifications, regulations, and practices); *id.* at §§ 303, 307(a) (authorizing the FCC to issue broadcast licenses "as public convenience, interest, or necessity requires"); *id.* at § 543(b)(1), (2)(C) (requiring the FCC to ensure that basic cable service rates are "reasonable" and that subscribers' rates do not exceed what they would be if there were effective competition, and setting forth seven factors for the FCC to "take into account"); *id.* at § 543(c)(1)(A), (2) (requiring the FCC to establish criteria for identifying "unreasonable" cable programming rates, and setting forth six factors for the FCC to "consider, among other factors").

[26] *See, e.g.*, Policy and Rules Concerning Rates for Dominant Carriers, 4 F.C.C.R. 2873, 3295-96 (1989).

[27] White Paper at 17-22.

[28] *Almendarez-Torres v. United States,* 523 U.S. 224, 238 (1998).

[29] White Paper at 19.

Constitution.[30] However, as more fully discussed in section II above, the plain statutory language does not make the CPI price cap permanent. Congress expressly limited its existence as a mandatory "requirement" of the regulatory "system" to a defined period, running until the end of the Commission review; any prolongation of the CPI cap beyond that point is not due to the continuing force of Section 3622(d)(1)(A), but instead would be due to a Commission determination that a similar cap should remain in effect following the initial period. There is no constitutional impediment to Congress creating an interim regulatory scheme that sunsets following a defined period of time, and then giving an Executive agency the authority to determine the appropriate contours of the regulatory system thereafter (subject, of course, to the requirement that Congress provide "intelligible principles" to guide the agency, which, as discussed below, is clearly the case here[31]).

A decision by the Commission to replace the price cap is therefore in no way "repealing" or "amending" statutory language. Even if the Commission's review could somehow be viewed as implicating the continuing force of statutory text, however, it would still be consistent with *Clinton*. In that case, the Court did not purport to hold unconstitutional all delegations of authority to the Executive Branch to alter the continuing force of statutory language. *Clinton* relied on the fact that the President had the authority to cancel the force and effect of statutory text under the Line Item Veto Act (LIVA) only within five days after the text was enacted, and that while the President "was required by [LIVA] to make three determinations before he canceled a provision, those determinations did not qualify his discretion to cancel or not to cancel."[32] These elements of LIVA meant that the President's cancellation decision "necessarily was based on the same conditions that Congress evaluated when it passed [the statutory text being 'cancelled']," and that, by issuing a line-item veto upon the exercise of his discretion so soon after enactment, the President was "rejecting the policy judgment made by Congress and relying on his own policy judgment."[33]

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[30] *Id.* at 18-19.

[31] *See infra* footnotes 36 and 43 and accompanying text.

[32] 524 U.S. 417, 443-44 (1997).

[33] *Id.*

The Court contrasted the delegation of authority under LIVA to other instances where Congress permissibly delegated authority to the Executive Branch to alter the continuing force of statutory text. The Court noted that these other delegations were predicated on the Executive Branch having a responsibility to ascertain circumstances not present when the statutory text was enacted, and to take action based on Congressional specifications.[34] Such delegations, the Court noted, constitute the Executive Branch "executing the policy that Congress had embodied in the statute," rather than rejecting Congress's policy judgment.[35]

The delegation of authority in Section 3622(d)(3) bears no resemblance to the President's LIVA authority, and is instead like the delegations that the Court has previously authorized and that it distinguished in *Clinton*. The Commission is tasked with determining what type of regulatory system best achieves the statutory objectives ten years after the enactment of the PAEA. Furthermore, the Commission exercises this determination based on 23 detailed objectives and factors that Congress has specified. When it enacted the PAEA, Congress made the policy judgment to let the regulatory system adapt to changing circumstances (which were unknowable by Congress at the time the PAEA was enacted) after ten years, and as appropriate thereafter, in order to ensure that the system continues to achieve Congress's objectives.[36] If the Commission ends up replacing the current CPI price cap upon determining that an alternative system would better account for the statutory objectives and factors, the

[34] *Id.* at 442-45 & n.39 (discussing *Field v. Clark*, 143 U.S. 649 (1892), and citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407 (1926)); *see also id.* at 446 n.40 (distinguishing LIVA from the Rules Enabling Act, which states that rules of procedure promulgated by the Court act to repeal conflicting prior procedural statutes, on the basis that "Congress expressly provided that laws inconsistent with the procedural rules promulgated by this Court would automatically be repealed upon the enactment of new rules in order to create a uniform system of rules for Article III courts," meaning that "Congress itself made the decision to repeal prior rules upon the occurrence of a particular event—here, the promulgation of procedural rules by this Court" (emphasis added)).

[35] *Id.* at 444.

[36] Congress has commonly allowed regulatory agencies to determine the precise contours of a regulatory system, and the postal rate-and-class system is no outlier in that regard. *See supra* note 25; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474-75 (2001) (citing cases in which the Court upheld broad legislative standards for regulatory authority, including those where the relevant standards were merely that rates, prices, or regulations be "in the public interest," or "generally fair and equitable"); *Clinton*, 524 U.S. at 485 (Breyer, J., dissenting) (same).

Commission would simply be executing, rather than rejecting, "the policy that Congress ha[s] embodied in the statute[.]"[37]

The Mailers fail to cite any authority that has employed *Clinton* to invalidate a statute analogous to Section 3622(d)(3). Rather, in the only case that considered an arguably similar statute, a court rejected an argument that the statute violated the principles of *Clinton*.[38] In *Terran,* the court considered the National Childhood Vaccine Injury Act (Vaccine Act), in which Congress specified an initial Vaccine Table to cover claims for compensation due to injuries caused by vaccines and empowered the Department of Health and Human Services (HHS) to promulgate revised Vaccine Tables that would apply prospectively to new claims, as updated information was acquired concerning the link between vaccines and injuries. HHS's authority under the Vaccine Act bears some similarity to the Commission's authority under Section 3622(d)(3): in both instances, Congress established interim regulatory regimes and authorized the agency to promulgate new regulations, based on the application of Congressional standards, in order to adapt to changing circumstances.[39] The court ultimately held that the Vaccine Act scheme was not an unconstitutional delegation of legislative authority. Thus, *Terran* underscores the baselessness of the Mailer's argument.[40]

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[37] White Paper at 19 (quoting *Clinton*, 524 U.S. at 444, and citing *Republic of Iraq v. Beaty*, 556 U.S. 848, 861 (2009)) (internal quotation marks omitted, alterations added)).

[38] *See Terran ex rel. Terran v. Sec'y of Health and Human Servs.*, 195 F.3d 1302 (Fed. Cir. 1999).

[39] If anything, Section 3622(d)(3) is even less susceptible to a *Clinton* challenge than the Vaccine Act that was upheld in *Terran*. Unlike Section 3622(d)(3), the Vaccine Act did not require HHS to conduct a review within a particular timeframe, meaning that the continued force of the statutory Initial Table was indeterminate. By contrast, under Section 3622(d)(3), the validity of the CPI price cap as a statutory requirement is expressly time-limited. To the extent that the cap remains the regulatory standard following the ten-year review, it is not because Section 3622(d)(1)(A) retains continuing force, but solely because of the Commission's judgment to retain the cap as a regulatory matter.

[40] The Mailers cite *Terran*, but seek to dismiss it on the basis that the HHS action was a "peripheral or limited adjustment[ ] to a larger statutory scheme." White Paper at 19. In fact, the Vaccine Table considered in that case is a central element of the compensation scheme established in the Vaccine Act: changes to the Vaccine Table fundamentally alter how that scheme operates. *See* Peter H. Meyers, *Fixing the Flaws in the Federal Vaccine Injury Compensation Program*, 63 ADMIN. L. REV. 785, 796-98 (2011) (describing the Vaccine Table's importance, particularly since the alternative means of determining eligibility for compensation is burdensome). Furthermore, the specific changes made by HHS that the court considered have been described as having a major impact on the functioning of the Vaccine Act. *Id.* at 789-90, 799-805 (noting that cases involving the Vaccine Table have dramatically declined from when the Act was first enacted, with the "most important" reason being that "the Table was substantially modified and narrowed by the Secretary of HHS in 1995 through an administrative rulemaking proceeding").

The Mailers also frivolously argue that Section 3622(d)(3) effects a "standardless delegation" that may "implicate" the limits imposed by the non-delegation doctrine.[41] To the contrary, Section 3622(d)(3) is quite clear about the "'intelligible principle' to narrow the agency's discretion."[42] The Commission's review of the regulatory system is based on the application of the statutory objectives and factors. There are nine objectives and fourteen factors. Each one states a specific public policy interest: high-quality service standards, predictability and stability in rates, pricing flexibility, sufficient revenues to maintain the Postal Service's financial stability, simplicity of rate structure, and so forth. These detailed standards demonstrate that Section 3622 does not even come close to approaching the outer bounds of delegation standards that the Supreme Court has upheld – virtually without fail – as constitutional.[43]

The Commission should therefore hold that the purported "constitutional issues" asserted by the Mailers are baseless and provide no basis for reading Section 3622(d)(3) in the atextual manner that the Mailers urge. In any event, even if the Mailers' analysis raised a significant question as to the constitutionality of Section 3622(d)(3) in the Commission's mind (which it should not), it would still be improper for the Commission to decline to apply the plain language of that provision. The canon of constitutional avoidance can only be used when a statute is ambiguous and readily capable of an

[41] White Paper at 20-21.

[42] *Id.* at 20.

[43] *E.g.*, *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 600-602 (1944) (upholding Federal Power Commission's selection of a rate formula pursuant to a statute requiring only that rates be "just and reasonable"); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943) (upholding FCC's authority to regulate broadcast licenses for the "public interest, convenience, or necessity"); *see also supra* note 25 (listing other rate-regulation statutes with broad standards for regulatory discretion and, in some cases, specific objectives and factors). It is telling that the Mailers cite two 1935 cases as authority for striking down a delegation as standardless: despite the Mailers' attempt to imply other supporting authority, those two cases are, in fact, the only instances where the Supreme Court has found unconstitutional delegations of authority. *Compare* White Paper at 3, 20 (citing cases "such as" *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-31 (1935)) *with Whitman*, 531 U.S. at 474 ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" (citations omitted)); *Clinton*, 524 U.S. at 485-86 (Breyer, J., dissenting) (same); *Mistretta v. United States*, 488 U.S. 361, 373 (1989) ("Until 1935, this Court never struck down a challenged statute on delegation grounds. After invalidating in 1935 two statutes as excessive delegations, we have upheld, again without deviation, Congress' ability to delegate power under broad standards." (citations omitted)).

interpretation that does not raise constitutional concerns.[44] As discussed above, however, it is unambiguously clear that Congress intended to give the Commission the authority to create an alternative regulatory system ten years after the PAEA's enactment. Interpreting that provision as failing to give the Commission this authority would therefore not be an act of interpretation, but an act of re-writing the statute, which the Commission cannot do even to avoid purported constitutional concerns.[45] Nor can the Commission ignore Congress's command by declaring that the authority granted to it by Section 3622(d)(3) is unconstitutional.[46] Thus, even if the Commission found the Mailers' constitutional claims to be credible, the proper role for the Commission is to implement the statute according to the unambiguous terms of its plain language and legislative history, and to leave assertions that Congress has acted in an unconstitutional manner to the courts.[47]

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[44] *See, e.g.*, *United States v. Stevens,* 559 U.S. 460, 481 (2010) (noting that the canon is available to construe "ambiguous statutory language" to avoid constitutional doubts, and a limiting construction under the canon is only permissible if the language is "readily susceptible to such a construction" (citations and internal quotation marks omitted)).

[45] *See, e.g.*, *Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). Indeed, an unconstitutional conferral of authority by Congress on an administrative agency cannot be cured simply by the agency "declining to exercise some of that power." *Whitman*, 531 U.S. at 472-73.

[46] *See, e.g.*, *Branch v. FCC*, 824 F.2d 37, 47 (D.C. Cir. 1987) (noting that "although an administrative agency may be influenced by constitutional considerations in the way it interprets or applies statutes, it does not have jurisdiction to declare statutes unconstitutional"). *See also* Certain Cellular Rural Service Area Applications*,* 17 F.C.C.R. 8508, 8517-18 (2002) (noting "established precedent that the Commission cannot declare an act of Congress void," and refusing invitation to decline to apply statutory provisions on constitutional grounds because "the Commission has no authority to disregard statutory requirements imposed on it by Congress").

[47] Even if the constitutionality of Section 3622(d)(3) were properly at issue, and there were a basis to find Section 3622(d)(3) to be unconstitutional, it would be incorrect to assume that the appropriate remedy would be to sever Section 3622(d)(3) and keep Section 3622(d)(1)-(2) intact. The severability of an unconstitutional provision from other statutory provisions is a question of legislative intent. *See, e.g.*, *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 683-685 (1987) (noting that severability analysis looks to "whether the statute will function in a manner consistent with the intent of Congress," and whether "the statute created in [the unconstitutional provision's] absence is legislation that Congress would not have enacted" (emphasis in original)). In performing this inquiry, it is necessary to evaluate "the importance of the [unconstitutional provision] in the original legislative bargain." *Id.*; *see also Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 191-194 (1999) (severance inappropriate when provisions constitute "one coherent policy"). Based on these principles, Section 3622(d)(3) is not severable from the rest of Section 3622(d): as described in section III above, Congress enacted a balanced compromise, which paired the initial CPI price cap with the ability of the Commission to design an alternative system after ten years in order to ensure achievement of the statutory objectives. This balance was essential to the passage of Section 3622(d). *See* 152 Cong. Rec. S11,675 (daily ed. Dec. 8, 2006) (statement of Sen. Collins) (describing the pairing of Section 3622(d)(3) with the rest of Section 3622(d) as a "compromise" necessary "to allow [the PAEA] to pass"). In fact, if Section 3622(d)(3) is unconstitutional,

VI. Conclusion

To claim, as the Mailers do, that the "plain language of Section 3622 establishes the CPI cap as the primary requirement of any system of rate regulation developed by the Commission and prevents the Commission from eliminating that requirement during its 10-year review of the system"[48] is impossibly at odds with reality. Under the Mailers' interpretation, clear and unambiguous statutory language is obscure and weightless, a detailed floor speech by the primary Senate sponsor of the PAEA disappears altogether, and an unremarkable directive to a regulatory agency to determine the contours of a ratemaking regime transforms into an unconstitutional power to repeal. The Mailers can convince themselves of whatever impossible things they please, but the Commission, like Alice, must be more sensible than that.[49]

The Commission's course could hardly be clearer. Until December 2016, the Commission is bound to apply the CPI price cap and other mandates in Section 3622(d)(1)-(2). After that initial period, however, Congress has charged the Commission with determining whether it should modify the current ratemaking system, or create an alternative system, based on its determination as to what is necessary to achieve the objectives that Congress has set forth as a guide. As part of that review, the Mailers are certainly free to argue that the Commission should retain the CPI price cap. However, they cannot reasonably argue that the statute forecloses the Commission from replacing the CPI cap if the Commission determines that doing so is necessary to achieve the objectives set forth in the law.

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the remedy most consistent with the original legislative objective, considering the imminence of the mandatory review, would be to excise the entirety of Section 3622(d) from the statute; this would, in turn, give the Commission the comprehensive authority to design a regulatory system to meet the objectives, taking into account the factors, pursuant to Section 3622(a).

[48] White Paper at 4.

[49] *See* LEWIS CARROLL, THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE 76 (Random House 1965) (1871) ("Alice laughed. 'There's no use trying,' she said: 'one ca'n't [sic] believe impossible things.' 'I daresay you haven't had much practice,' said the Queen. 'When I was your age, I always did it for half-an-hour a day. Why, sometimes I've believed as many as six impossible things before breakfast.'" (emphasis in original)).